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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-956

LISTON PACK, Pastor of the Holiness Church of God in Jesus Name, et al.,
Petitioners,

vs.

STATE OF TENNESSEE, ex rel. Henry F. Swann, District Attorney General,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent, State of Tennessee, respectfully submits that the Petition for a Writ of Certiorari filed in this case should be denied.

OPINIONS BELOW

The opinion of the Circuit Court of Cocke County, Tennessee, handed down on September 27, 1973, is unreported but appears in the Appendix of the Petition for a Writ of Certiorari filed herein. (Appendix, pp. 1a-2a). The opinion of the East-

ern Section of the Court of Appeals of Tennessee dated October 25, 1974 is also unreported but appears in the Appendix of the Petition for a Writ of Certiorari filed herein. (Appendix, pp. 3a-22a). The opinion of the Tennessee Supreme Court is reported at 527 S.W.2d 99.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution and Tennessee Code Annotated, Section 39-2208 which provides:

> "It shall be unlawful for any person, or persons, to display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.
>
> Any person violating the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred and fifty dollars ($150.00), or by confinement in jail not exceeding six (6) months, or by both such fine and imprisonment, in the discretion of the court."

QUESTION PRESENTED

Whether the judicial determination that the petitioners' religiously motivated, public handling of poisonous snakes and drinking of poison amounted to a common law nuisance violates the Free Exercise Clause of the First Amendment or the petitioners' constitutionally protected right of privacy.

STATEMENT OF THE CASE

On April 14, 1973, the District Attorney General for Cocke County, Tennessee, filed an action in the Cocke County Circuit Court seeking to enjoin the petitioners from handling poisonous snakes and drinking poisonous liquids during their much publicized religious services. The circuit court granted the State a temporary injunction on April 21, 1973. Three months later, on July 28, 1973, the circuit court held the petitioners in contempt of court for willfully violating the terms of this order.

The petitioners eventually filed their answer to the State's petition for an injunction on September 27, 1973, the day of the hearing to determine whether the temporary injunction should be made permanent. The petitioners admitted in their answer that they and others attending their services handled poisonous snakes and that persons have been bitten during these episodes.

There is no substantial factual dispute between the parties. The entire factual situation is dependent upon the pleadings, the testimony of one state witness at the hearing held September 27, 1973, and several stipulations and exhibits.

The petitioners and members of their congregation as well as others desiring to be present out of curiosity conduct their religious services at the Holiness Church of God in Jesus Name in Cocke County, Tennessee. The church is a small structure holding no more than one hundred people which is located at the end of an unpaved mountain road approximately one-half mile from the nearest paved road. Because of the increasing notoriety of this church's activities, an agent of the Tennessee Bureau of Investigation attended three different church services. He testified with particularity about one service when the church

was filled with curiosity seekers, young children and the regular parishioners. Four persons handled poisonous snakes during that service.

The part of the church where the snakes were handled consisted of a small area not more than ten feet wide between the rostrum and the first row of benches where the congregation sat. Children customarily sat in these front row benches with their parents, and the agent observed children sitting on the front benches during the services he attended. After discovering that no one would be arrested for handling snakes, petitioner Liston Pack announced to the audience that there was a snake available for handling if anyone felt that they were "annointed" or if the "spirit" told them to.

While the congregation clapped and sang, Pack took a brown, wooden box from beneath the rostrum, and after placing it on the front bench where people were sitting, removed a diamond back rattle snake from the box, handled it briefly, and then returned the snake to the box, which he then placed atop the rostrum. Later in the service, the snake was handled by petitioner Ball who handed it to a member of the choir and later to an older member of the audience. The entire service lasted approximately ninety minutes, and the snake was not handled longer than four minutes. However, while the snake was being handled, children were sitting within ten feet of these activities and were walking unattended in the aisle. On one occasion during the service, petitioner Ball almost dropped the snake but was able to catch it before it hit the floor.

The parties also stipulated that they had repeatedly handled poisonous snakes and that they had willfully violated Tennessee Code Annotated, Section 39-2208. They also stipulated that one or more persons had been bitten by poisonous snakes during their services. The petitioners also tendered the testimony of an anthropologist who would state that snake handling

has been a traditional part of this church's rituals as well as the testimony of two individuals who were of the opinion that the handling of poisonous snakes did not pose a danger to the "non-annointed" members of the audience. This evidence differed from the Tennessee Bureau of Investigation agent's testimony that he felt he might be in some danger when the snake was removed from the box even though he was seated midway back in the congregation.

Based on this proof, the circuit court dismissed the petitioners' claims that "(t)o enjoin the defendants would violate their constitutional rights of privacy and religion" and permanently enjoined the petitioners from handling poisonous snakes but permitted them to drink poisonous liquids as long as they did not offer them to any other persons (Petitioners' Appendix, pp. 1a-2a). The petitioners perfected an appeal to Eastern Section of the Court of Appeals of Tennessee again alleging the permanent injunction handed down by the circuit court violated First Amendment rights as well as their right to privacy.

The Court of Appeals, with one judge dissenting ruled in its opinion handed down on October 25, 1974, that the injunction handed down by the circuit court was unconstitutionally overbroad. (Petitioners' Appendix, p. 20a). While the court found that the State had proved that the petitioners' activities constituted a public nuisance (Petitioners' Appendix, p. 14a), the court concluded that the petitioners' right of privacy coupled with their constitutionally protected freedom of religion, permitted them to handle poisonous snakes or imbibe poisonous liquids as long as these activities did not endanger the life or health of any persons who did not consent to exposure to this danger. (Petitioners' Appendix, pp. 18a-20a).

The Tennessee Supreme Court granted the State's petition for a writ of certiorari to review the opinion of the Court of Appeals, and on September 8, 1975, reversed the decision of the inter-

mediate appellate court and reinstated and broadened the earlier decree of the Cocke County Circuit Court. The Court held:

> "We hold that under the First Amendment to the Constitution of the United States and under the substantially stronger provisions of Article 1, Section 3 of the Constitution of Tennessee, a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society; but the action of the state must be reasonable and reasonably dictated by the needs and demands of society as determined by the nature of the activity as balanced against societal interests. Essentially, therefore, the problem becomes one of a balancing of interests between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed in favor of religious freedom, and yet the balance is delicate."
>
> *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (Petitioners' Appendix, p. 42a).

The Court then analyzed the facts contained in the record of this case and concluded:

> "Under this record, showing as it does, the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of 'annointment', we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so. The human misery and loss of life at their 'Homecoming' on April 7, 1970 is proof positive."
>
> *State ex rel. Swann v. Pack, supra*, 527 S.W.2d at 113 (Petitioners' Appendix, p. 46a).

Having determined that the petitioners' activities constituted a public nuisance, the Tennessee Supreme Court turned to the question of the appropriate remedy. After directing the circuit court, on remand, to enter an injunction permanently enjoining the petitioners from handling, displaying or exhibiting dangerous and poisonous snakes or from consuming poisonous substances within the State of Tennessee, the Court noted:

> "We could find no rational basis for limiting or restricting the practice, and could conceive of no alternative plan or procedure which would be palatable to the membership or permissible from a standpoint of compelling State interest. The very considerations which impel us to outright prohibition, would preclude fragmentation of the religious services or the pursuit of this practice on a limited basis."
> *State ex rel. Swann v. Pack, supra,* 527 S.W.2d at 114
>
> (Petitioners' Appendix, pp. 48a-49a).

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REASONS FOR DENYING THE WRIT

I

The Tennessee Supreme Court's Decision Adhered Strictly to Federal Precedents Involving First Amendment Liberties.

The Tennessee Supreme Court's decision is premised on the distinction, consistently recognized by this Court, between an individual's unencumbered right to believe whatever he chooses and his right to translate his beliefs into action. While the former is not subject to regulation or governmental interference of any sort, the latter is often subject to regulation by the state when the health, safety or welfare of society is involved. *Wisconsin v. Yoder*, 406 U.S. 205, 219-220, 92 S.Ct. 1526, 1535 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903 (1940); and *Reynolds v. United States*, 98 U.S. 145, 166-167, 25 L.Ed. 244, 250-251 (1878). The Tennessee Supreme Court recognized, however, as has this Court, that even if the State demonstrates a compelling state interest which justifies interference with an individual's First Amendment rights, it must protect these societal interests by using a method that will cause as little interference with the individual's rights as possible. *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003 (1972) and *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252 (1961).

Using the balancing approach formulated by this Court in *Sherbert v. Verner*, 374 U.S. 398, 406-407, 83 S.Ct. 1790, 1795-1796 (1963), the Tennessee Supreme Court found that Tennessee's compelling interest in protecting the health, safety and welfare of its citizens justified the burden placed upon the petitioners' exercise of certain of their religious beliefs.

The constitutional precedents forming the foundation of the Tennessee Supreme Court's decision were gleaned from decisions

of this Court involving individuals' religiously motivated actions which took place in secular contexts. But even if the settings in which the questioned actions in earlier cases took place differ from the circumstances of this case, their motivation is still spiritually derived, and so there constitutional protection is still based upon the First Amendment of the United States Constitution. Just as this Court has determined that the First Amendment freedoms of religion are not limited to acts taking place in a religious context, so should this Court decline to narrow its long standing precedents so that they only apply to actions taking place in secular contexts. A religiously motivated act that is detrimental to the welfare of society will not be rendered less detrimental because it takes place in a church rather than a park or street.

II

There Is No Reasonable Expectation of Privacy Surrounding Religiously Motivated Acts Performed in Public.

The petitioners also claim that one of their penumbral First Amendment rights, their right of privacy, insulates their religiously motivated actions from regulation by the State. To adopt this reasoning would be to greatly expand the scope of an individual's constitutionally protected zone of privacy. This Court has found that the right of privacy applies to a person's activities in the privacy of his own home, *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248 (1967) and to the intimate relationships stemming from activities relating to marriage. *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726-727 (1973). While the petitioners' assertion in this case would have more force if the record showed the petitioners handling poisonous snakes in the privacy of their own home, the fact that the petitioners' activities usually take place in a crowded church during ceremonies commonly attended by the public and

are apparently motivated by some evangelical purpose shows that the petitioners have no real expectation of privacy concerning their actions and, in fact, desire none.

In *Roe v. Wade, supra,* this Court recognized that the right of privacy was not wholly immune from regulation when important state interests are involved. The context of the abortion question, this Court ultimately concluded that the interests of the mother would, at a certain point in time, be outweighed by the interests of the unborn child as well as the State's interest in preserving the health of the mother. By so holding, this Court has recognized that in certain situations, the interests of society will justify interference with an individual's actions, even when these actions are directed primarily against the individual himself.

This same rationale was adopted by the Tennessee Supreme Court in this case and has been consistently adopted by other federal courts that have been called upon to balance an individual's religiously motivated actions with their adverse effects on others. *In re President and Directors of Georgetown College, Inc.,* 331 F.2d 1000 (D.C. Cir.), *reh. denied en banc,* 331 F.2d 1010 (D.C. Cir.), *cert. denied,* 377 U.S. 978, 84 S.Ct. 1883 (1964).

CONCLUSION

The First Amendment issues raised in this case are merely questions of the application of long recognized constitutional principles to a fact situation never before considered by this Court because of the unique and isolated nature of the religious practice involved. The fact that Tennessee has chosen to protect the fundamental interests of its citizens by using a civil remedy rather than a criminal one does not amount to a significant expansion of the authority of the State to interfere with

the actions of its citizens when society's interests require such interference. An individual's actions, even when they are religiously motivated and personally directed, are still subject to reasonable regulation by the state if they adversely affect the health, safety or welfare of society. Thus for the reasons stated herein, the State of Tennessee respectfully submits that this petition for a writ of certiorari be denied.

Respectfully submitted

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